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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/873,475	06/04/2001	Louis Dischler	2060G	5759

7590 11/15/2002

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EXAMINER
BEFUMO, JENNA LEIGH

ART UNIT	PAPER NUMBER
1771	2

DATE MAILED: 11/15/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

TC-2

Office Action Summary	Application N .	Applicant(s)	
	09/873,475	DISCHLER ET AL.	
	Examiner	Art Unit	
	Jenna-Leigh Befumo	1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____ .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-24* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-24* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Double Patenting

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1 – 24 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 2, and 11 – 10 of U.S. Patent No. 6,112,381. Although the conflicting claims are not identical, they are not patentably distinct from each other because the fabric claimed in US 6,112,381 is a woven fabric with an abraded surface, as claimed in this application. The woven fabric is further recited to be a warp-faced twill fabric in claim 13 of US 6,112,381. Additionally, the recited fabric would inherently have the claimed property since the fabric is abraded by the same process. Therefore, the fabric recited in this application and the fabric claimed in US 6,112,381 overlap in scope.

3. Claims 1 – 24 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 2 – 4 of U.S. Patent No. 6,230,376. Although the conflicting claims are not identical, they are not patentably distinct from each other because the fabric claimed in US 6,230,376 is a woven fabric with an abraded surface, as claimed in this application. The woven fabric is further recited to be a warp-faced twill fabric in

claim 4 of US 6,230,376. Additionally, the recited fabric would inherently have the claimed property since the fabric is abraded by the same process. Finally, the treatment is removed from the finished fabric and would not be present in the final product. Therefore, the fabric recited in this application and the fabric claimed in US 6,230,376 overlap in scope.

4. Claims 1 – 24 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 - 18 of copending Application No. 09/777,444. Although the conflicting claims are not identical, they are not patentably distinct from each other because the structural limitations recited in the claims are the same. The only difference between claims in the two applications are the recited properties which are inherent to the woven, abraded fabrics since both fabrics have the same structure and are processed the same way. Thus, the scope of both applications overlap

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 112

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claims 1 – 24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

7. Claims 1 – 24 are indefinite because they only claim properties of the abraded woven fabric fail to set forth the composition or structure that produces the recited fill tensile strength and low degree of pilling. Claims that merely set forth physical characteristics desired in an

article, and not setting forth specific compositions which would meet such characteristics are invalid as vague, indefinite, and functional since they cover any conceivable combination of ingredients either presently existing or which might be discovered in the future. Ex parte Slob (PO BdApp) 157 USPQ 172.

The Applicant has failed to set forth any structural limitations of the claimed abraded fabric that directly relate to the fill yarns tensile strength or the fabrics pilling. What structural limitations produce the recited properties? Is the fill strength property a result of weft yarns structure or is it due to the abrading process? Is it the materials of the type of processing which produce the low degree of pilling?

8. The phrase "exhibit a harsh" in claim 1 is indefinite. The Applicant does not recite what is harsh? Further, it is not clear what qualifies as harsh, versus something which is soft? Claims 2 – 24 are rejected due to their dependence on claim 1.

Claim Rejections - 35 USC § 102/103

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

11. Claims 1 – 6, 9, 10, 13, 14, 17, 18, and 20 – 24 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Otto (4,468,844).

Otto discloses a surface-finishing technique which abrades the surface of various fabrics (abstract). The fabrics include woven fabrics such as twill or plain weaves (column 6, lines 44 – 45). The fabrics can be made from various fibers including natural fibers such as cotton, synthetic fibers such as polyester, and blends thereof (column 6, lines 48 – 53). Specific examples use yarns made of a blend of 63/35 polyester/cotton (Example 7).

Although Otto does not explicitly teach the limitations of fill tensile strength or the degree of pilling, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. woven fabrics made of blended polyester/cotton yarns) and in the similar production steps (i.e. abrading the surface of the fabric) used to produce the napped fabric. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed limitations would obviously have been provided by the process disclosed by Otto. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102. Thus, claims 1 – 6, 9, 10, 13, 14, 17, 18, and 20 – 24 are rejected.

12. Claims 1 – 24 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Willbanks (5,080,952).

Willbanks discloses a napped fabric with uniform pile height and cover, without the degree of weakening of the fabric strength in either the warp of fill direction (column 3, lines 6 – 12). The fabrics used in the examples include twill fabrics made from blended 65/35

polyester/cotton yarns (Examples 2 and 4). The twill weave in Example 2 is a 2x1 twill weave and the twill weave in Example 4 is a 3x1 twill weave. Both of these weaves are warped-face twill weaves.

Even though Willbanks discloses that the method of abrading the surface results in stronger fill yarns than other abrading process (column 3, lines 33 – 35), Willbanks does not explicitly teach the limitations of retained fill tensile strength or degree of pilling, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. twill weave fabrics made from 65/35 polyester/cotton yarns) and in the similar production steps (i.e. abrading the surface of the fabric) used to produce a plush, napped fabric. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed limitations would obviously have been provided by the process disclosed by Willbanks. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102. Therefore, claims 1 – 24 are rejected.

Claim Rejections - 35 USC § 103

13. Claims 7, 8, 11, 12, 15, 16, 19, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Otto.

The features of Otto have been set forth above. Although Otto discloses that various types of fabrics including twill weave fabrics can be abraded, Otto fails to teach using warp-faced twill weave fabrics. However, it would have been obvious to one having ordinary skill in the art to choose a warp-faced twill weave, since it is within the general skill of a worker in the art to select a known type of twill structure, and would only involve routine skill in the art.

Further, one of ordinary skill would have been motivated to choose a warp-faced twill fabric since warp-faced fabrics are commonly used in popular garments and upholstery fabrics such as denim and gabardine. Therefore, claims 7, 8, 11, 12, 15, 16, 19, and 20 are rejected.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jenna-Leigh Befumo whose telephone number is (703) 605-1170. The examiner can normally be reached on Monday - Friday (9:00 - 5:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (703) 308-2414. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

Jenna-Leigh Befumo
November 1, 2002

TERREL MORRIS
SUPERVISORY PATENT EXAMINER
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